Supreme Court, U.S.
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Application No. -A-489

In The

Supreme Court of the United States

October Term, 1998

EDWARD D. COWHIG,

Petitioner, Pro Se

vs.

TOGO WEST, SECRETARY OF THE ARMY, et al

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (98-5116)

EDWARD D. COWHIG
Petitioner, Pro Se
245 C. J. Cushing Highway
Greenbush, MA 02040-0154
(781) 545-4330

10788

QUESTIONS PRESENTED

1. In a nutshell, can anyone believe that an official US Military Record is properly in the custody of the Catholic Church officials and that only the church officials can authenticate that record, as the lower courts seem to believe based on governmental statements?

2. Whether this petitioner's resignation from the Regular Army because of false allegations and undue pressure from Church authorities in 1961 because they accepted allegations as true based on the cachet of a three-star general can be considered voluntary, especially when and as the Army Board for the Correction of Military Records (ABCMR) declared in 1974, my resignation and separation to have been involuntary?

3. Does not the United States Court of Federal Claims have proper jurisdiction over the violation of a contract between the government and the Military Archdiocese of Military Services, USA?

4. Can the statute of limitations res judicata, laches or any other proper legal doctrine hold in the presence of fraud, continuing fraudulent concealment and gross misrepresentation which is seriously misleading?

5. Can the error of Judge Diane Gilbert Weinstein of the United States Court of Federal Claims in the order of 19 March 1998, be allowed to stand when in that order she refers to my "voluntary resignation," when it was not so and also refers to Case No. 427-80C (1981) in the Court of Claims, as that Court mis-spoke again referring to a "voluntary resignation."

6. In the presence of fraudulent concealment of an official record, which is still missing, destroyed, lost, shredded, or whatever and which was the cause, reason cited by both Church and State as the motivation for their action, can the conclusions of Judge Weinstein as stated 19 May 1998, namely that (1) the plaintiff's claim is barred by the statute of limitations which bars this court of subject matter jurisdiction, and (2) that the claim is barred by claim preclusion, really hold?

7. Is not the fraudulent separation from the Regular Army of a Regular Army Officer, confirmed by the US Senate, who has served beyond the probationary period a violation of statutory law (10 USC 3785) (now 10 USC 1185) and Army Regulation (AR601-100)?

8. Is not a show cause hearing required before a Regular Army Officer can be separated involuntarily from the Regular Army?

9. Does not the possession of top-secret information prevent one from divulging such to civilian authorities who do not have a military need-to-know and who were not cleared for such information?

10. Is not the withholding of documentary evidence which a party has the "duty of custody" and a "duty to disclose," while at the same time trying to exculpate itself by asserting that such documentary evidence is properly in the hands of another and that such other party is the only one who can authenticate such evidence, indicative of bad faith and obstruction of justice?

11. Are not government officials of the Army Board for the Correction of Military Records (ABCMR), in effect, guilty of contempt of Congress by asserting false exculpatory statements to several Senators and Congressmen?

12. Is not the gross misleading misrepresentation and false statement to Speaker John McCormack in 1964, that the putative report from Lt. Gen. Paul W. Caraway was to Cardinal Spellman, causing this plaintiff much delay as well as injury indicative of misconduct on the part of government officials and bad faith as well?

13. Is not the impermissible intermixing of Church and State affairs clearly evident when officials of both contracting entities violate statutory law (10 USC 3785) as well as the Code of Federal Regulations (32 CFR 65.5 (b)(v) in the case of a Regular Army Officer, which require a show cause hearing?

14. Are not deprivation of civil rights under the color of law or in this case, the ostensible customary practice between the Chief of Chaplains office and officials of the Catholic Church, indicative of a violation of 18 USC 242, hence discriminatory?

15. Have not all the lower courts in the long history of this dispute, in 5 USC 706 regarding the Scope of Review, especially 2(b) therein, ignored the element stated in USC 706, "contrary to constitutional right, power, privilege or immunity?"

16. Can blatant false statements, continuing concealment of evidence even to this date, be allowed to stand?

17. Can anyone call it fair or just when the Government has suppressed a supposedly official document, for over 37 years, a copy of which is in Church files, and which copy has been utilized in official hearings and in judicial actions below, in addition to which the Government has certified in court that this petitioners Official Military Personnel File (OMPF) is "true and exact" when there is no such report or document?

18. Is it not in effect contempt of Congress when Government officials make false and misleading statements to members of Congress in attempts to cover up their own errors and violations of Law?

19. Can it be fair when the Chief of Chaplains office has prematurely decided that a Regular Army Chaplain is to be "Rad" (removed from active duty) even before his departure from Okinawa where he is performing his duties according to 32 CFR 510.1 and the rules of his Church in a very perilous situation with high efficiency rating?

20. Whether a contract between the US Government and the Catholic Church in regard to Chaplains in general and Chaplains in the Regular Army in particular, has been violated wherein there has been a failure to follow statutory law and the Federal Code, failure to provide a show cause hearing, violation of due process, while concealing

essential evidence and even at this late date, fraudulently concealing the official document giving rise to this case?

LIST OF PARTIES:

1. U.S. Secretary of the Army
2. Potential parties:
   (a) Archdiocese for Military Services, USA
   (b) Archdiocese of Boston

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APPEALS COURT ORDER OF 20 AUGUST 1998

Rehearing denied 2 October 1998 (App. D, D)

Extension of Time to File for Pet. Cert. was granted 17 December 1998 to extend to and including 30 January 1999 (App. F)

Statutory Provision for Jurisdiction is based on the Constitution; Articles 1, 4, 5, and 7 as well as basically 10 USC 3785; 28 USC 1346; 5 USC 706; 18 USC 1001, 1505, 1506, 2071. (See App. L.)

ORDERS

US Court of Federal Claims (98-180C), 19 March 1998, App. A

US Court of Federal Claims (98-180C), 15 April 1998, App. B

US Court of Federal Claims (98-180C), 19 May 1998, App. C

US Court of Appeals for the Federal Circuit, (98-5116), 20 August 1998, App. D

Extension of time, Appendix G

Verbatim orders are in the Appendix A-F

Jurisdiction is based on the Constitution and statutory law, 10 USC 3785; 28 USC 1346; as well as many other statutes and Federal Codes like 32 CFR 65; 32 CFR 510.1; 32 CFR 981.3(d)(5)(i). At bar now is the order of 20 August 1998 by the US Court of Appeals (98-5116).

TEXT

1. After thirty-seven (37) years of trying, with persistent diligence, to rectify an enormous wrong, it seems to this plaintiff to be about time for someone in authority to look at the basic facts and laws to discern the constitutional violations therein and the threat to the whole Chaplains Corps. This is an important matter of public policy. No one is above the law.

2. Even a quick look at the brief here presented should indicate to a reasonable person that the courts below and administrative agencies and boards have so far departed from the accepted and usual course of judicial proceedings and also, sanctioned such a departure by a lower court, as to call for an exercise of this Supreme Court's supervisory power (Rule 10(a)).

3. If false allegations to the endorsing bodies of religious faiths and subsequent falsehoods are considered of little import, it bodes ill for the spiritual health of our nation.

4. Normally religious bodies and their endorsing agencies which contract with the government for services tend to be trusting and ready to accept reports sent to them by government officials.

5. At the same time, by contract, the endorsing bodies agree and it is so stated in the Code of Federal Regulations (CFR) that they will abide by the applicable regulations and policies of the Department of Defense (DoD) (32 CFR 65.5(b)(v). Also by that same section of the federal code in 65.5(b)(ii) it states that the faith group shall "be able to exercise ecclesiastical authority to grant or withdraw ecclesiastical certification" (sometimes termed endorsement). (See Exh. 10 Comp.) (41USC 601, 602)

6. The United States Court of Federal Claims in its order of 19 March 1998 erred twice in referring to my resignation as "voluntary" and then states that it lacks subject matter jurisdiction. But 28 USC 1346(a)(2), mentioned in paragraph 1 of my complaint asserts that, " . . . the District

Court shall not have jurisdiction of any civil action or claim against the United States founded upon my express or implied contract with the United States." The resignation was forced by religious authority and later declared "involuntary" by the Army Board for the Correction of Military Records (ABCMR) in 1974. (Exh. 20 Comp., App. F, herein.)

7. "Because of the limiting qualifications in regard to the amount in controversy and to the question of jurisdiction expressed in 28 USC 1346(a)(2), as this is a hybrid case involving both a wrong (a tort) and breach of contract 41 USC 601 as expressed in the Contract Dispute Act of 1978, this complaint is brought to this Court of Federal Claims." (Par. 1, p. 1 of Complaint.) (See also par 2-14.)

8. Between these two contractual subsections of 32 CFR 65.5(b), mentioned above, this plaintiff has been ensnared by the acceptance by the government of a forced resignation of this plaintiff based on false allegations from a high authority in the military, which documentation had been withheld from this plaintiff by church authorities for nineteen (19) years. This documentation the reputed author has denied preparing. (Exh. 5, Comp.) He has stated to church authorities that he presumed his assistants knew the facts. (Exh. 16, Comp.) The documentation is still missing and which government officials have stated; it is "properly" in the hands of the church and that "only" church authorities can authenticate it. (Exh. 3, Comp.)

9. These statements by government officials are most preposterous and fly in the face of reason and reality. For anyone to assert that official military documents are properly in the files of my church and that only they (i.e., church officials) can authenticate such documents is most reprehensible. This is what has been stated to Senators and Representatives. (Exh. 3 Comp., also see Exh. 4 at p. marked 87 where the Asst. Sec. of Army states, ". . . I have again reviewed the entire case including his military records . . ." This is certainly la breach of contract. (See Exh. 10 Comp.) (Contract Disputes Act)

10. In addition to these false statements, there is the outstanding fact that is no documentation of any military report from the putative author

in the custody of the government certified when it presented my Official Military Personnel File (OMPF) in my initial Court of Claims action (no. 427-80C) as "true and exact" (Exh. 11, Comp.) when there was no report of Lt. Gen. Paul Caraway contained therein. Again, a breach of contract which includes a "duty to disclose." (Exh. 12, Comp.)

11. Regarding "the statute of frauds," Restatement Second (205) on Contracts(?) provides: "Every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement." Concealment, misrepresentation and false statements by the Government most certainly violate these conditions in this case. "Thou shall not bear false witness against your neighbor." Nobody has the right to lie (see LaChance v. Jackson, S.Ct. No. 1395, (1998.))

12. That action (427-80C) presented pro se as a non-lawyer, while I didn't even have a rule book but depended on the friendly advice of others was decided on the statute of limitations grounds and which was the basis of the later res judicata decision.

13. The government which has a duty to disclose has been guilty of fraudulent concealment or worse in all these previous actions as this plaintiff had to rely on a copy of the 1961 document of Lt. Gen. Caraway, "the Caraway Report," which I finally received, (after recourse to the Apostolic Delegate of the Holy Sec to the United States), in August 1980 from the Military Ordinariate (now the Archdiocese for Military Services, USA). (Exh. 9, Comp.) Please note addressee.

14. This copy clearly manifests that the report, the "Caraway Report" was addressed to the Chief of Chaplains, US Army, Washington, DC. It also makes clear that the many assertions by government officials of the Army Board for the Correction of Military Records (ABCMR) that the report was "to Church officials" were false.

15. This Supreme Court has an obligation to the truth and a rational inquiry to the truth. "The direction in which the law moves is often a guide for decision in particular cases, and here it serves to conform our conclusion. However, halting its progress, the trend in litigation is

toward a rational inquiry into truth, in which the tribunal considers everything logically probative of some matter requiring to be proved." (Thayer, a Preliminary Treatise in Evidence, 530 Funk v. US, 290 US 371.)

16. "This court has refused to accept assumptions of fact which are demonstrably false" (US v. Provident Trust Co., 291 US 272) "even when agreed to by the parties" (Swift and Co., v. Hocking Valley R. Co., 243 US 281). This was presented to the United States Court of Federal Claims in my motion under Rule 59 (a)(1) and 60 (b)(3) and (6) RCFC in response to the order of that court of 15 April 1998, with permission to file late, if applicable. This above mentioned citation was also in my petition for certiorari in the 1995 October term (denied 2 December 1996) as par. 29, pp. 35, 36, therein. (See also par. 49, p. 25 Comp.) (Also Exh. 16, Comp.)

17. To this non-lawyer, pro se petitioner, it seems to be most unfair to have to repeat over and over again the cases, authorities and pleadings that have consumed so much of his time, his energy and his expense in so many courts in the protection of his right "to petition the government for a redress of grievances."

18. Fundamentally this case concerns the deprivation of this plaintiff's constitutional rights of due process as expressed in the Fifth Amendment; "nor shall any person . . . be deprived of life, liberty, or property without due process of law" and also this plaintiff has been denied the "equal protection of the laws" guaranteed by the Fourteenth Amendment despite the many encounters in the courts so far. My reputation is a "liberty interest." My Regular Army commission was a property interest. (Exh. 15 and 21 Comp.)

19. The Supreme Court has stated, "Conventional motions of finality of litigation have no place where life, liberty, is at stake and the infringements of constitutional rights in alleged . . . " (Sanders v. US, 373 US 1 at 8).

20. Also, the Supreme Court has stated, "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation." (Montana v. US (1979) 99 S. Ct. 970, 979.)

21. The "availability of evidence to defend himself" which is a landmark decision of this Supreme Court was, has been, and still is withheld from this plaintiff (Brady v. Maryland (1963), exact citation unknown to this plaintiff).

22. The "availability of evidence" to defend myself has been fraudulently concealed by officials of the US government in that the official report of Lt. Gen. Paul Caraway, which is required (Friedman v. US (1958), 158 F. Supp. 364, 141 Ct. Cl. 239) is still nowhere to be found except on a copy in church files and should be considered as mere secondhand hearsay since the same Lt. Gen. has denied preparing any such document, (Exh. 5 Comp.) and later be asserted to now Cardinal John O'Connor that he presumed his deputy, Gen. Power (then deceased) knew the facts. (Exh. 16, Comp.) But General Power could not have known the facts by himself as the report contained allegations of religious defects and chaplaincy non-cooperation, none of which were true. (See Motions under Rules 59, 60, originally part of Pet. Cert. (94-2001) pp. 124-153, also sworn affidavit, Exh. 22 Comp and App. H, J, K, herein.)

23. The Declaration of Independence states: "We hold these truths to be self evident, that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." May I add that in the Catholic Church, "the pursuit of happiness" includes eternal happiness. This is the pursuit of which the "cura animarium," the care of souls, is all about. This also is the prime objective of Catholic Chaplains in the military service as expressed in Canon Law and pastoral practice of the Church, and in 32 CFR 510.1, as "conscientious practices."

24. On 20 August 1998, the United States Court of Appeals for the Federal Circuit ordered: "that the United States unopposed motion for

summary affirmance is granted." I have tried to explain why I did not answer that motion. I had already, previously, in my temporary interim response and also in motions mailed 8 May 1998, as well as in my formal appeal brief mailed 26 June 1998, treated these matters as great length, with rather fulsome appendix. I considered the matters adequately covered by these presentations. My formal brief contained 43 pages of text with Appendices A to O. All were received by the Clerk of Court.

25. In mid July 1998 the "affirmance motion" was addressed to a different address than what I had been given in my complaint. It was delivered to the Church Rectory and mislaid for some time. I was not sure of what "summary affirmance" meant and since I had fully covered these matters in my two briefs, I did not think it needed a response.

26. I was shocked when the order of 20 August 1998 stated that "Cowhig has not responded." Later in a telephone conversation with the clerk's office I was then informed that motions and briefs were handled separately and independently of each other. I tried to point this out to the Appeals Court when I submitted a motion for reconsideration/ rehearing of the 20 August 1998 order of the Appeals Court and opposition to the Government's motion of affirmance of July 7, 1998, with a suggestion for rehearing, en banc. This was mailed 10 September 1998. Both the petition for rehearing (denied) and the suggestion for rehearing en banc (declined) on 2 October 1998. A motion of 7 October 1998 to revoke those orders was not considered.

27. In the order of the United States Court of Appeals for the Federal Circuit (98-5116), dated 20 August 1998, that court mentions the lower court's dismissal of my complaint for lack of subject matter jurisdiction (see par. 6, 7 above) and the note that this plaintiff had not responded to the government's notice for summary affirmance. I have tried to explain the latter above. (Par. 24-26.)

28. The Appeals Court also stated; "In addition, the trial court determined that to the extent Cowhig alleged a claim sounding in tort, jurisdiction over such a claim was exclusively granted to district courts."

But as I have mentioned above (par. 6, 7 above and in par 1-4 Comp), 28 USC 1346(a)(2) asserts that; ". . . the district court shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States." Certainly the contract with an individual officer entering the ranks of the Regular Army is a personal, individual contract with all the rights and privileges thereto. (Exh. 21, Comp.). This includes that any officer in the Regular Army who has served beyond the probationary period, has the expressed rights and privileges spoken of in 10 USC 3785 (now 10 USC 1185) (Exh. 2, Comp.). These rights include a show cause hearing for any alleged sub-standard performance of duty and as 10 USC 1185, as well as 3785 states in subsection (a)(4), "shall be allowed full access to and shall be furnished copies of records relevant to his case. . ." (L)

29. This access has never been provided from 1961 to now in 1999. If this is not a breach of contract, nothing is and the law is meaningless. We hear a great deal of the "rule of law" and "nobody is above the law" these days. The Chief of Chaplains is not above the law.

30. In 1961, the Chief of Chaplains ignored this law, even before I left Okinawa (Exh. 8, Comp.) where I was serving in a most dangerous situation. (Exh. 18, Comp.) Our unit was alerted twice in 1961 to parachute into the airfield in Vientianne, Laos. This plaintiff, the only qualified, able and willing Catholic Chaplain in the entire Pacific area, was in possession of "top-secret" information on a "need-to-know" basis. (App. A of Appeal BR.) Before I departed Okinawa, the Chief of Chaplains office, probably on the basis of cursory telephonic reports from people who were "not in the know," decided that this plaintiff was to be "RAD" (removed from active duty). Besides being premature, it was most arbitrary. (Exh. 8, Comp.)

31. To compound this situation when a report dated 11 October 1961, after I left Okinawa, reached the Chief's office, it was transmitted to my religious superior without any access to me, without my knowledge and all behind my back. (See Exh. 8A Comp.)

32. My religious superiors acted on this transmission by requesting my resignation (Exh. 19 Comp, (1995)) and when personally approached in New York by this plaintiff, in 1961 **demanded** my resignation in no uncertain terms. The Chancellor of the Military Ordinariate stated quite forcefully; "Ed, I am the umpire and when I say you are out, you are out." Well do I remember those words.

33. In the face of this demand, I "reluctantly" resigned and so stated on my resignation paper (6-7 November 1961). Incidentally, at the same time, 6 or 7 November 1961, there was issued a questionable and disputed "diagnosis" at Walter Reed Hospital recommending, in effect, that this plaintiff should be returned to military control and disposition. What a mess!

34. As this honorable Supreme Court is aware, the courts already hesitant to be involved in military matters will not interfere in the judgment of a hierarchically organized religion. ". . . rulings on ecclesiastical matters could not be reviewed." However, they noted that "this conclusion was true in the absence of fraud, collusion, or arbitrariness." Nowak, Rotunda, Young, Constitutional Law, West Pub. Co., quoting Gonzales v. Roman Catholic Bishop of Manilla 280 US (1929) at 16. "A judicial decision, no less than an act of legislation, which invades protected religious liberty is invalid," also " . . . the state has no power to interfere or regulate the internal affairs of a church." (97L ED 124) (344 US ?). See Shelly v. Kraemer, 334 US1, 92 L ED 1161, 68 S. Ct. 836 and others.

35. "Military Corrections Boards have abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." Yee v. United States, 512 F.2d 1383; 206 Ct. Cl. 388 (1975).

36. "Secretaries of military departments have duty as well as power to afford servicemen proper relief by correcting military records." Sanders v. United States, 504 F.2d 804 (Ct. Cl. 1959).

37. In the recent impeachment proceedings, Mr. Craig, one of the president's lawyers said, "You can't investigate charges without telling who is charged, what it is they're being charged with. It's like attacking a man who is blindfolded and handcuffed. These are not fair procedures." (*Boston Globe*, 22 October 1998.)

38. This plaintiff has been blinded and handcuffed for over thirty-seven (37) years by the governments fraudulently concealment of a official document that they have a duty to disclose.

39. To sum it all up, I have been denied, consistently and constantly, any *opportunity* for the constitutional safeguards of confrontation and cross examinations even to this date in 1999. (GREENE v. U.S. 376 U.S. 149, at 155)(See par. 7, 8,9 Infra)

40. In short it is clear that what I drank or did not drink, the record states that I was in the *top 5 percent of all captains at that time* that there was *no indication* of sub-par performance of duty (other than "the Caraway Report"), that there was *no dereliction* of any duty, no treatment for any alleged condition, hence rendering my discharge under Title 10 U.S.C. 3785, or in any other way, unjust (see testimony of CO Ex. O and Doctor, Exh. 6, pp. 2-24, comp. (App. H, J, K herein), and the *whole record* proves that I was *deprived* of my *constitutional rights without any possibility of confrontation or cross examination.* "A judgment obtained in violation of procedural due process is not entitled to full faith and credit. . . " [GRIFFIN v. GRIFFIN, 327 U.S. 220 (1946]

41. I was doing my job in the "internal forum" but have been shut down so far in the external forum, without cause. (32 CFR 510.1)

42. Perhaps in "the interests of justice" this Honorable Court could *invite* the Archdiocese for the Military Services, U.S.A. to participate in this case as "amicus curiae," despite, for their own reasons, declining my request to do so, to date. Likewise the Archdiocese of Boston, as the sub-contractor, has an interest here.

43. Important throughout this case should be the stipulations of Administrative Law and Procedure (Key West 412) and Statutes (Key West 263) as printed prior to the discussion–GREENE v. U.S. 376 U.S. 149. It states therein that: *retrospective operation* will not be given to a statute or administrative regulation which interferes with *antecedent rights . . .* "

44. This is important because of my "*ecclesiastical endorsement,* my license to serve in the military" *threatened by duress in 1961* is analogous to the "security clearance" improperly removed in the Greene case. Also, to be noted is that my endorsing agency, a legal corporation, has stated (28 August 1984) that it will *not* now oppose my reentry into active duty, another corollary analogy as in the Greene case.

45. In the cited case where security clearance was vacated, this Honorable Court quoted that "in the absence of explicit authorization from either the President or Congress the respondents were *note empowered* to deprive petitioner of his job in a preceding in which he as *not afforded the safeguards of confrontation and cross examination.* (GREENE v. U.S. 376 U.S. 149, at 155). Also, in the same case, at 162:

> "In a case such as the present, where the government has acted without authority in causing the discharge of any employee *without providing adequate procedural safeguards* we should be reluctant to conclude that a regulation not explicitly so requiring, conditions restitution on a *retrospective* determination of the validity of the *substantive reasons* for the Government action -- reasons which the employee was *not afforded an adequate opportunity to meet or rebut at the time of his discharge.* This principle is analogous to that reflected in state court decisions recognizing the '*a private association's failure* to afford procedural safeguards may result in the imposition of damage liability *without* inquiry into whether the association's action lacked sub*stantive basis. . . .*'"

46. I have, time and time again, brought to the attention of various courts, the express statement of the law in regard to records, namely

Title 5 USC 552(a) which clearly asserts;" Each agency that maintains a system of records shall upon request . . . permit him . . . to review his record and to have a copy made." But how can this be done if there is no official record and the government states that the document this plaintiff desires is "properly in the hands of your church," "has been properly prepared" and "only they (i.e., the Church can authenticate it." This is most unreasonable. It is kafkaesque! It amounts to obstruction of justice.

47. In Mulvaney v. Stetson, 493 F. Supp. 1218 (1980), Marshall, the District Judge, noted: ". . . we held plaintiff's action was not barred by the six-year statute of limitations contained in 28 USC #2401 because . . . (Correction Board) . . . had considered plaintiff's plea . . . we held that the instant action . . . a request for a review . . . did not accrue until the date of the Correction Board's decision . . . we concluded that we have mandamus jurisdiction under 28 USC #1361 to review . . . " (at 1219). Mulvaney discharged in 1945. Court decision July 1980. In this case now in 1999, the date of the last decision by the Army Board was 15 June 1993. (See Motions under 59, 60, pp. 91, 92.)

48. In regard to the limitations of government in "Constitutional Law" in Nowak, Rotounda, Young, on page 496 they assert:

> "When the government acts so as to injure an individual's reputation, it will deprive that individual of his liberty if the damage is so severe as to significantly limit his association or employment opportunities." (see Exh. 15 Comp.)

49. In "Constitutional Law," Nowak, Rotunda, and Young, on page 496, in writing about fundamental rights, assert:

> "Today the justices of the Supreme Court will apply strict forms of review under the due process clauses and the equal protection clause to any government actions which limit the exercise of 'fundamental' constitutional rights. These are rights which the Court recognizes as having a value so essential to individual liberty in our society that they justify the justices reviewing the acts of other branches of government in a manner quite similar to the substantive due

process approach of the pre-1937 period . . ." "fundamental rights analysis is simply no more than the modern recognition of the natural law concepts first espoused by Justice Chase in Calder v. Bull, 3 US (3 Dall.) 386 (1798)."

50. Ratner, "The Function of the Due Process Clause," UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 1048 (1968). The same authors in the same book, p. 501 asserted: "The Court has continually held that a trial in a fair tribunal is a basic requirement of due process." In Re Murchison, 349 US 133, 136 (1965). "This requirement applies to agencies and government hearing officers as well as judges." Withrow v. Larkin, 421 US 35, 46 (1975), Gibson v. Berry Hill, 411 US 564, 479 (1973). To date, this plaintiff has been denied a jury trial despite his request for such.

51. In this case of Pet. Cert. in 1999, I would like to refer to Geyen v. Marsh, 775 F. 2d 1303 (1985) Circuit (8 Nov. 1985) where Judge Thornberry held: ". . . plaintiff's second cause of action, challenging the ABCMR decision . . . was barred neither by limitations nor by laches." I believe this to be so in my case, as the ABCMR action in 1993 is not only subsequent but distinct. (See Motions under 59, 60, pp. 91, 92.)

52. Neal v. Sec. of Navy, 639 F. 2d 1029 (1981), Judge Slovitier, District Judge - this case at 1036 ruled:

"We further held that the US Army is an 'agency' within the meaning of APA since 'agency' is defined to include 'each authority of the Government,' 5 USC #701(b)(1)(1976) . . . At 1042 (Idem) par. 9: "The Statute establishing Military review panels explicitly obliges them to act to 'remove an injustice,' 10 USC #1552(1)(1976)." Also, at 1043: "The relationship between the merits of a decision and the procedure by which it was reached is well recognized. Neal was deprived of the opportunity to know the precise matters which were being considered in connection with his request to reinstatement." At 1044 (idem): -- "As Judge Frankfurter wrote, 'the validity and moral authority of a conclusion largely depend on the mode by which it was reached.'" Joint

Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 171 S.Ct. 624, 648, 94 L.Ed. 817 (1951).

Restoration to Duty

53. "Where an outstanding Air Force officer was the victim of biased effectiveness reports and general harassment by superiors to the point where he tendered his resignation which he later attempted, unsuccessfully, to withdraw, and a Board for the Correction of Military Records upon his application to grant him reinstatement to active military service corrected his record to the extent that it vacated the erroneous fitness reports and conceded that plaintiff had rendered remarkably outstanding service for the entire period covered by such reports, but refused to reinstate him on the ground that justice did not require his restoration to the military since he was doing so well in his civilian employment, that Board has acted arbitrarily and capriciously and the officer's post-discharge history of success has no bearing on whether or not an error or injustice has been committed in connection with the rejection of his withdrawal of his resignation and his entitlement to be restored to active duty." Hankins v. US, 1968, 183 Ct. Cl. 32.

Stigma Type Discharge

54. "Normally, if a stigma-type military discharge is determined to have been illegal, discharge is ineffective to terminate credit for active duty also, even though active duty is not performed, and full back pay should be awarded until termination of enlistment in case of enlisted person or until service is lawfully terminated in case of an officer. Carter v. US, 1975, 509 F. 2d 1150, 206 Ct. Cl. 61."

55. The employment of 10 USC 3785 in 1974 (App. G herein) in this case at bar as an authority for separation is a stigma-type discharge as it involves and implies "moral or professional dereliction of duty." (Exh. 20 Comp.)

56. "The doctrine of res judicata extends only to facts and conditions as they existed at the time of judgment was

rendered, and to the legal rights and relations of the parties as fixed by the facts determined by the judgment. When other facts or conditions intervene, forming a new basis for a claim, the issues are not longer the same as res judicata does not apply." Clark v. Yosemite Community College Dist., 785 F2d 781 (9th Cir. 1986); Miller v. Lehman 736 F2d 1268 (9th Cir. 1984).

57. William O. Douglas in *A Living Bill of Rights*, published by Doubleday and Co., Inc., Garden City, NY (1961) on page 53 therein in speaking of basic freedoms; "the rights of accused persons (f), the right of accused to know what he is charged with, to present evidence in his defense and to have the process of the courts (subpoenas) to compel the attendance of witnesses whom he wants to call. These are all rudiments of due process of law in the federal and state courts." (Emphasis supplied.) In this case, that has not been done.

58. (a) This same distinguished jurist in the same publication on page 54(i) wrote about "protection against bills of attainder" in regard to punishment "in other regimes," and on page 55 wrote:

> "We rejected that form of punishment when we outlawed bills of attainder. If either a state or the federal government wants to punish a man it must proceed against him in a judicial trial. So the court held in 1946 that it was a bill of attainder for Congress to adjudge or declare certain federal employees disloyal and to provide that no federal funds should be used to pay their salaries then or at any time in the future." (United States v. Lovett, 328 U.S. 303) "Depriving a man of his job, branding him as disloyal, and making him a virtual outcast was deemed to be punishment."

This plaintiff asserts that what the Government has done in this case at Bar though not a legislative bill of attainder has had the same results of depriving him of his job, branding him disloyal, and making him a virtual outcast.

(b) Continuing, Justice Douglas remarks:

"Taken together these rules of criminal procedure (this plaintiff contends that they are also applicable in civil procedure) are essential safeguards of our freedom. Unless the procedures by which the law is enforced to protect individuals against oppressive trial practices, substantive rules of law (which spell out our property and civil rights and tell us what constitutes a crime) will have little meaning. If a man can be tried in secret, for offenses not defined by law without adequate opportunity (emphasis supplied) to know and answer charges made against him, without protection from mental or physical torture, without a lawyer to defend him, his substantive rights are not protected or secured. The procedural rights guaranteed by our constitution are among the crucial distinctions between our society and a police state." (id. p. 55)

(c) In addition to the above remarks, Judge Charles E. Wyzanski, Jr., in speaking about judicial review had written:

". . .without judicial enforcement, written constitutional declarations of civil liberties are apt to be mere admonitions. Absent an institutional framework for their vindication, they will have no greater force than a parson's injunctions" (particularly poignant as this plaintiff is a Catholic priest). " . . .but our tradition has always emphasized the role of the courts in preserving fundamental rights." (The Bill of Rights by Learned Hand, the Oliver Wendell Holmes Lectures, 1958--introduction by Charles E. Wyzanski, Jr., Athenaeum, New York, 1986.)

59. This plaintiff has diligently pursued his cause over many years and through many administrative and judicial procedures to no avail being blocked by recourse of the defendant to several ordinarily suitable defenses. But "res judicata" does not hold in the presence of conduct subsequent to such a holding and as the court of appeals (1st circuit) maintained in Kilgoar v. Colbert Co., Board of Education, 578 F. 2d 1033 (1978), nor does the statute of limitations hold in the presence of

fraud, nor should the Contract Disputes Act be ignored, especially 41 USC 601(7), speaking of "misrepresentation of fact." (Exh. 10 Comp.)

60. The government has consistently denied access and still does to what it claims to be an "official document" but declares it to be "missing" from its legal custody and unreasonably has declared to several members of Congress that it is "properly" in the "hands of your Church," and that "only they," i.e., the Church, "can authenticate it." (Exh. 3, 19 Comp.)

The behavior on the part of government officials is preposterous, arbitrary capricious, and most unreasonable. It is not honest!

61. The Supreme Court has stated,

> "Because res judicata may cover grounds and defenses not previously litigated, it blockades unexplored paths that may lead to the truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It is, therefore, to be invoked only after careful inquiry." (Brown v. Felsen (1979) 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767.)

62. In fact, the conduct of government officials is punishable, as stated in several statues, namely 18 U.S.C. 1001; 18 U.S.C. 1505, 1506, and 2071. (See App. L herein.)

63. Restatement 26 of Judgements refers to the exceptions of the general rule; (1) when any of the following circumstances exists the general rule of #24 does not apply: (d) the judgement in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme." In short has the existence of fact, the ultimate official fact (the "Caraway Report) or the non-existence of the ultimate official fact ever been adjudicated? This is the cornerstone of any transaction, which is to be determined pragmatically. Due process is essential! Liberty is at stake!

64. (a) Restatement Second of Judgements #26 (3) states:

> "For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of the suit and chooses the latter course." Also 24 (f) subsection (1) is applicable in this case at bar. "It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy."

The reputation of this plaintiff, a liberty interest, is at stake. The denial of my fundamental right of due process is a violation which demands strict scrutiny. (Exh. 15 Comp.)

(b) Restatement Second of Judgements #70 in regard to which this plaintiff has acted with all due diligence, despite obstruction and appeals to higher authorities, speaks of fraud and corruption as well as duress. An example of corruption on the court (427-80C), and corruption on the attorney, that is this plaintiff, as he is acting pro-se, is the certification under seal and blue ribbon of my Official Military Personnel File (OMPF) which contained hundreds of pages and I remind this court that is it official in the Court of Claims in 1981 as "true and exact," wherein there is no official "Caraway Report."

65. Yet an unofficial "Caraway Report" from Church files clearly indicating the addressee as the Chief of Chaplains, US Army, Washington, DC, has been utilized to my injury in both administrative and court actions. Another example of corruption and duress is the behavior of the ABCMR and the acting assistant Secretary of the Army insisting upon the authenticity of the "Caraway Report," in 1993, and basing his opinion "on Church documents," (Exh. 4 at 88) certainly proves that the government has no official report of that artifact. This is certainly an intermingling of Church and State affairs, especially since my Church authorities have consistently stated that they acted in 1961 because of the putative "Caraway Report," (Exh. 19, Comp.), itself

based on assumptions and presumptions (Exh. 16, Comp., also Exh. 8A-idem, 1984). In actual fact, the Church acted on 31 October 1961, before any diagnosis of Walter Reed Hospital which was dated 7 November 1961, even that diagnosis was flawed. (See Motions under 59 and 60, pp. 126-139.)

66. I have consistently and persistently sought justice in this matter over a period now covering thirty-six years, all the time willing and able to serve my country, certainly during the Vietnam period, when the existence of this spurious report was in the archives of my Church but this plaintiff was denied access to it. The falsity of the contents of the "Caraway Report" should be evident to any reasonable person and I have made every reasonable effort to so prove by competent testimony, both military and medical. (See Exh. 6, pp. 2-24 of Comp., App. H, J, K herein). Please remember, I was restrained by top secret classification, preventing this plaintiff from divulging to anyone who did not have a "need to know." There is the possibility that General Caraway signed a report prepared by others on assumptions (Exh. 16, Comp.). I saw a report for about 45 seconds in 1961, outside the Chief of Chaplains office, presented by a clerk from that office, after my forced resignation, but was vehemently denied the possibility of even taking notes on it when I tried to do so. This behavior has become a real "shell game."

67. "As a general rule, fraudulent concealment of a cause of action tolls the statute of limitations until the cause of action is discovered or might have ben discovered by the exercise of diligence" 54 CJS 88, p. 126.

> "The purpose of the fraudulent concealment doctrine is to prevent a party from profiting from his own wrong. The principles of equitable tolling due to fraudulent concealment are read into every federal statute of limitations . . ." "It is especially applicable where there exists . . . a fiduciary relationship or one of trust . . . " IDEM, p. 127.

68. Conduct subsequent to prior litigation is not precluded by Res Judicata - Ct. (1st Cir.) 1978 - Kilgoar v. Colbert Co. Board of Education, 578 F. 2d 1033 (1978). In this case at bar it should be

decided if an official report addressed to the Chief of Chaplains, US Army, exists or not, and if not, the contents of an unofficial report from private sources, the Church's archives, and its authenticity as well as its veracity is certainly open to question now since its veracity has been clearly contradicted by medical and military testimony. (Exh. 6, pp. 2-24 of Comp.) (App. H, J, K herein)

69. 18 USC 1512 prohibits the persuasion of another person to withhold, alter, destroy, or mutilate documents to prevent their use in an official proceeding. It should be noted that all the previously cited statutes (18 USC 1503, 1505, 1506, 2071, as well as 18 USC 1001) prohibit the attempt to obstruct justice, even if actual obstruction does not occur. Also for liability to result the actor need not intend to obstruct justice, so long as that is the natural and probable consequence of his actions. (See United States v. Rasheed, 663 F.2d at 852); United States v. Neiswender, 590 F.2d 1269 (4th Cir.).

70. Restatement Second of Judgements, Section 62(b) provides an exception to preclusion of issue and claim (b) . . . where the defendant's fraud or misrepresentation prevented the plaintiff from including the entire claim in the original action," (or subsequent actions, this plaintiff asserts).

71. But Rule 1003 FRCP states that a duplicate is admissible unless (1) a genuine question is raised as to the authenticity of the original. (Lt. Gen. Caraway has denied the preparation of the so-called putative "Caraway Report.") (2) in the circumstances it would be unfair to admit this duplicate in lieu of the original. (The denial of access to the original has blocked this plaintiff for many years).

72. Secondary evidence which is not true evidence at all but is tainted evidence derived from the "Caraway Report," has been used to this plaintiff's personal and professional injury, both militarily and ecclesiastically, in violation of constitutional rights. The contents of this false report with its allegations and charges have been used in correspondence with Congressmen and ecclesiastical leaders. (Exh. 3 Comp.)

73. "The justification for the submission of secondary evidence has been held to compel a stricter scrutiny of the reasons for non-production where suspicious circumstances exist, particularly when the circumstances are indicative of bad faith or where the original sought to be proven with secondary evidence, was the very basis of the action," 83 ALR-FED 554 at ALR-Fed 554 at 561.

74. Professor Vestal (V-559) has written about the limitations of preclusion; "although the interest of society in the orderly adjudication of matters supports res judicata/preclusion, there are significant limitations which circumscribe its application. These limitations arise from (1) the Constitution (see Chapter 14 Supra) and (2) the gross impact of the doctrine upon a specific factual situation (see Ch. 13 C(4) and (5) Supra. The constitutional limitations involve giving the precluded party in the adjudication process, due process, right to trial by jury when appropriate and equal protection of the law (see Ch. 14, #C, D, and E supra).

75. "Preclusion in all its facets must operate (emphasis supplied) within this framework. Another limitation on the application of res judicata/preclusion is found in certain areas of fundamental importance such as the constitutional rights of individuals at some point. The interest in finality and repose is subordinated to an attitude on the part of society that a correct result is essential when certain matters are at stake. The interests of the litigant are so vital that relitigation to secure the correct result seems desirable." (Idem)

76. "A further limitation is found in the conflict between truth and preclusion at some point, preclusion must yield to obvious truth. An earlier adjudication may be so egregiously wrong that it simply cannot be allowed to stand. Although such cases may be rare, they are an exception to the normal rule of preclusion." (Idem)

77. The American Law Reports, ALR 3d (cases and annotations) Vol. 33 at p. 1098, speaks of "conduct calculated to induce non-action with respect to asserted claim until expiration of prescription period." The

misrepresentation by Maj. Gen. Fred C. Weyand, Chief of Legislative Liaison in a letter to Speaker John W. McCormack, 6 April 1964, (Exh. 7 Comp.) that the "Caraway Report" was to Cardinal Spellman blocked access to that report until 1980, when upon inspecting it for the first time, this plaintiff noted that it was clearly addressed to Chief of Chaplains, U.S. Army, Washington, DC. Whether intentional or not, this misrepresentation to a very high authority constitutes conduct calculated to conceal or prevent discovery by its very nature.

78. The continued conduct by the governmental agency, the ABCMR and the Acting Assistant Secretary of the Army in a most unreasonable attempt to exculpate itself by asserting that the "Caraway Report" was "properly in the hands of your Church," that, "it was addressed to Church officials," and that "only they can authenticate it," was and is most reprehensible. These statements were made to many members of Congress. (Exh. 3 Comp.) The Assistant Secretary of the Army in his rationale in denying relief after the 1983 ABCMR hearing, referred to the "edict of the Church." (App. O) In 1993, he asserted his "personal opinion" as to the authenticity of the "Caraway Report" based on Church documents. (Exh. 4 Comp. at 87.)

79. By concealing the official "Caraway Report," if there was one, and causing this plaintiff to rely upon partial extracts thereof, abstracts from Church letters, in his action before the ABCMR in 1974 wherein my separation was declared involuntary according to 10 U.S.C. 3785 (Exh. 20 Comp.), is another example of misconduct and even then according to that statute, my rights were denied as I was not given all the records relevant to my case, as that law requires for Regular Army officers. "Half a loaf" was and is unacceptable. 10 U.S.C. 3785 carries a Stigma! See DeBow v. United States, 193 Ct. Cl. 499, 434 F.2d 1333 (1970) He Must be Made Whole, Ray v. U.S., 197 Ct. Cl. 1, 453 F.2d 754 (1972).

80. In a letter to Congressman J. Joseph Moakley in March of 1993, the acting assistant secretary of the Army offered his "personal" opinion as to the authenticity of the "Caraway Report," "based on Church

documents." Ignoring new evidence, the ABCMR denied this plaintiff on 15 June 1993. (Exh. 4 Comp.), (Motions p. 91-92.)

81. There is a large difference between "hearing records," from Church archives which this plaintiff has presented to the governmental agency involved and also to the courts and the "official record" which should be in the legal custody of the government, but is not. (App. N herein.)

82. In the letter to Speaker McCormack in April 1964, Major General Weyand refers to "the immediate or proximate reason for the action (i.e., my separation from the Regular Army) was a report from Gen. Paul W. Caraway . . . to Cardinal Spellman. (Exh. 7 Comp.) General Weyand goes on to specify the allegations contained in the "Caraway Report," then he goes on to say, "Chaplain Cowhig's military career was outstanding aside from the deficiency noted above." Speaker McCormack, thinking it was an ecclesiastical matter, went no further.

83. In this long, long history of this litigation since 1981 in the Court of Claims which had original, primitive jurisdiction in this matter of contract, the Government has fraudulently concealed evidence, used tainted evidence, lied about custody and authentification of an essential official document, obstructed justice (even in 427-80C) before the Court of Claims at that time by certifying my Official Military Personnel File (OMPF) as "True and exact" when this was not true. There was no document of Lt. Gen. Caraway therein! Is this not fraud upon the court?

84. A duplicate of an official military document ("The Caraway Report") addressed to the Chief of Chaplains, US Army, Washington, 25 DC, dated 11 October 1961, was withheld from me by the Church until August 1980, when I received a copy of this duplicate from Church files, and this copy along with Lt. Gen. Paul W. Caraway's denial of authorship was presented in 427-80C, Court of Claims.

85. To this day in January 1999, I have never received any record of this document from the Government. They have simply said that it is "missing" that they "don't know why," that it is "properly in the files of your Church" (App. N herein) and a most amazing and unreasonable

statement (and to me most stupid and arrogant) that "only they (i.e., the Church) can authenticate it," (to Sen. Tsongas and Kennedy, May 1980). (Exh. 3 Comp.) This is a clear case of trying to "pass the buck," of trying to avoid responsibility, to exonerate one's self, to blame my Church for custody and authentication of a supposedly official document. Such behavior is impermissible. (See letter to Speaker O'Neill, (1978) (Exh. 12 Comp.)

86. The decision of Judge Nichols in 427-80C stated, "We need not address other defenses raised by the Government or the merits of the cause of action," in barring the case because of the Statute of Limitations. This order of Judge Nichols which did not get to the substantive issues in this case, probably because of my lack of knowledge in procedural matters. I did not even have a rule book and was advised by a lawyer friend that I had plenty of time, which I did not.

87. This ruling of Judge Nichols on the Statute of Limitations has been a high hurdle to overcome in subsequent litigation, as it has been considered as a basis for "res judicata" in lower courts.

88. However, the statute of limitations and res judicata cannot hold in the presence of consistent fraud, misrepresentation, fraudulent concealment and false statements which have characterized the Government's behavior. How can a plaintiff defend himself when the original official indictment contained in the putative "Caraway Report" is illegally withheld even in the face of Lt. Gen. Caraway's written denial of authorship? (Exh. 5 of Comp.)

89. No one is above the law especially officials in the Chief of Chaplains Office of the United States Army. Officials in that office totally ignored the law regarding Regular Army officers and consequently violated the requirements of statutory Law 10 USC 3785, (Exh. 2 Comp.) at that time, now 10 USC 1185, as well as Army Regulations (AR 601-100) regarding Regular Army Officers even before this plaintiff left Okinawa on 6 October 1961 at a highly critical time (Exh. 18 Comp.) by prejudicially transmitting a TWX to the Commanding General of USARYIS that this plaintiff was to be RAD

(Released from Active Service). (Exh. 8 Comp.) This should be clear to this court from the notes maintained by the Chief's office and recovered by this plaintiff years ago. (Idem.) I believe telephone contacts had been made previously between the Chief's office and the non-airborne, non-classified Chaplains at IX Corps Headquarters. After my forced resignation, I was hastily shown the "Caraway Report" by a clerk in the Chief's office and forbidden to even take notes on it. The high ranking officials in the Chief's office did not have the courage to face me personally or to follow statutory law. What they considered finesse was finagling.

90. The Chief's office previous to my forced resignation, had transmitted a copy of a so-called "Caraway Report" to officials in my Church's endorsing body without my knowledge or any opportunity to address the situation. This would have been difficult in any case as this plaintiff was in possession of highly classified "Top-Secret" information with a "need-to-know" character. (Exh. 14 of Comp.) Additionally, the endorsing agency was in violation of 32 CFR 65.5(b)(1)(v) (Exh. 1 of Comp.)

91. Officials at my endorsing agency's office in New York sent this plaintiff a letter, 31 October 1961, requesting my resignation. Leaving the hospital I took a train from Walter Reed General Hospital to New York. The Chancellor of the Military Ordinariate (my endorsing Church organization) showed me no papers but finally asserted, "Ed, I am the umpire! When I say you are out, you are out." Motivated by religious concerns, I reluctantly submitted my resignation at the demand of my Church authorities. I even used the phrase "reluctantly" on the resignation papers I submitted. This was in no way voluntary! Nor could I inform him of the situation in Southeast Asia. (Exh. 18 Comp.)

92. Even the personnel officer in the Chief of Chaplains Office when processing that resignation in November of 1961 under the remarks section, Item 11 thereon, asserted; "the ecclesiastical endorsing agency concerned will remove Chaplain Cowhig's ecclesiastical endorsement if his resignation is not accepted." (Exh. 17 of Comp.) No one can reasonably say that this was a voluntary resignation from the erroneous

statement of Judge Nichols in Court of Claims Action No. 427-80C that this plaintiff's resignation was "voluntary." In that action of 1980-81, I was unable to pursue the case as my brief was declared untimely and later "moot." Pursuing this case, I was lost in a legal thicket. My motion to revoke was denied. The error regarding my involuntary resignation was repeated by Judge Weinstein in the Court of Federal Claims in 1998.

93. Whatever legal actions subsequent to the Court of Claims action of 1980, I have always been subverted by the later Courts' basing their decisions on that of the Court of Claims Case No. 427-80C and thereby asserting "res judicata."

94. Please remember that Lt. General (Ret.) Paul W. Caraway in 1979 had denied in writing that he prepared any letter concerning me nor did anyone else, military or civilian, in his headquarters, do so. (Exh. 5 of Comp.) But nobody seems to accept this written testimony of a three-star general but relies on a duplicate of that putative report, denied to his plaintiff from 1961 to 1980 by his Church, and finally extracted from Church files. It seems to this plaintiff that the government is keeping or has kept two sets of books. In the Court of Claims action (1980) the Government certified my Official Military Personnel File (OMPF) as "true and exact" with seal and blue ribbon wherein there was no "Caraway Report." (Exh. 11 of Comp.) But there was this toxic duplicate of the so-called report in the files of my Church causing much damage to my liberty and property interests. (Exh. 9 of Comp.)

95. The Government in a 6 April 1964 letter to the Speaker of the House of Representatives asserted that the "Caraway Report,"

> "the immediate or proximate reason for the action (this plaintiff's separation, discharge) was a report from Lt. General Paul W. Caraway, Commanding General, USARYIS/IX Corps. and High Commissioner, Ryukyu Islands, . . . to Cardinal Spellman . . ." (Exh. 7 of Comp.) (See also Exh. 12)

This is a false statement and a blatant misrepresentation to a very high political person who ostensibly decided that is was purely a

religious matter. No so! But it was not to be until 1980 that this plaintiff was finally to have access to a duplicate which clearly shows that the document dated 11 October 1961 (after my departure from Okinawa) was addressed to the Chief of Chaplains, US Army, Washington, DC 25. (Exh. 9 of Comp.) Prior to 1964, I tried to get copies of my files from the Chief's of Chaplains office but they did not even answer my letters. Unfortunately, I have no copies of those letters.

96. "The term 'misrepresentation of fact' means any false statement of substantive fact or any conduct which leads to a belief of substantive fact material to a proper understanding of the matter in hand made with the intent to deceive or mislead." (41 USC 601(7) - Exh. 10 Comp.)

97. Among these many references (all are important), is one that I find very pertinent and relevant to this case in which governmental wantonness and irresponsibility are characteristic, particularly when trust and honesty are expected and anticipated. That one reference is to a decision of the Supreme Court (Greene v. McElroy; Greene v. US) in regards to "the safeguards of confrontation and cross examination" of which this plaintiff has been deprived to this very day as the official document is not only said to be "missing" as late as 19 June 1984, (App. N herein) but attempts by Government officials to foist responsibility onto my Church in letters to several Senators and Congressmen have been frequent. (Exh. 3 of Comp., also Exh. 4 at marked p. 88) It is crazy! I still do not have any official report!

98. The Supreme Court speaks in the case of Greene of a private association failure to provide procedural safeguards but "imposition of damage liability may result without inquiry into whether the associations action lacked substantive basis. . . " My Church was deceived and seduced, as well as this plaintiff.

99. The original, official document attributed to Lt. Gen. Paul W. Caraway is still missing, the government has stated that it does not know how (App. N herein), and the government further states that "only the Church" can authenticate it. Certainly Rule 44 (b) FRCP in regard to

the lack of record should be in force in this situation and the lack of record is "admissible as evidence that the records contain no such entry."

100. Constitutional protection of due process has been consistently denied to this plaintiff by the misconduct of government officials and the fraudulent concealment of the official original "Caraway Report" even at this stage of all my legal actions and should stay the limitations doctrine so often expressed by judicial officials.

101. Please remember that this putative document was the original indictment, the sum total of all the allegations against this plaintiff. Fraud stops the clock!

102. "As a general rule, fraudulent concealment of a cause of action tolls the statute of limitations until the cause of action is discovered or might have been discovered by the exercise of diligence" (54 CJS 88, p. 126). I may have been prolix, but I have been diligent for 37 years in the face of government officials' stonewalling and cover-up.

103. "The purpose of fraudulent concealment doctrine is to prevent a party from profiting from his own wrong. The principles of equitable tolling due to fraudulent concealment are read into every federal statute of limitations . . ." It is especially applicable where there exists . . . a fiduciary relationship of trust . . . (54 CJS 88, p. 127).

104. Title 5 USC 706 states that a reviewing court shall: 1) compel agency action "unlawfully withheld or unreasonable delayed;" and 2) among other stipulations (d) "without observance of procedure required by law," and that in doing so the court shall review, "the whole record." This is impossible when the "whole record" is not whole!

105. To be or not be, that is the question? Is it or is it not? A thing cannot be and not be at the same time! An official document is not in official custody, but a duplicate has been in the files of my Church since 1961 but only released to this plaintiff in 1980. Is this fair? Is it just? Can such continuous concealment and long withholding be consistent with due process? Is it not an interference with this plaintiff's right to

practice his religion as a priest and his penumbral right to association, as well as impermissible intermingling of Church and State? This state of affairs exists now in January of 1999. Can any legal doctrine condone such behavior?

106. "In determining whether a cause of action should be deemed continuous for purpose of limitations, particular policies as well as the nature of wrongful conduct and harm must be considered." (Cooper v. US CA-ILL 1971, 4442 Fed 2d 908).

107. "One may violate USCS by willful failure to carry out his duty." (Catlette v. US (1943, CA4 W.VA.) 132 F.2d 902; Lynch v. US Casga 189 Fed 2d 476.

108. " . . . willfulness encompasses reckless disregard for the law . . ." Korholtz v. US, 269 F.2d 897, 903 (10th Cir. - 1959); 80 S.Ct. 307.

109. 32 CFR 581.3(D)(5)(i) states that a petitioner will be assured of "access to all official records," as does 10 USC 3785 (a)(4) - (Exh. 2 of Comp.)

110. Restatement Second of Judgements, ALI (1982) writing about the exceptions to the general rule 26(J) identifies mistake, or fraud, or concealment or misrepresentation by the defendant as reason for an exception to the general rule, stating,

> "A defendant cannot justly object to be sued on a point or phase of the claim that the defendant failed to include in an earlier action because of the defendant's own fraud."

111. "Military Correction Board can correct an injustice not amounting to legal error, but for the Court of Claims to grant judicial relief there must be an unlawful act made so by a violation of a statute or regulation or published mandatory procedure or unauthorized act or so unsupported by evidence as to be a gross injustice, unlawful because of clear legal or factual error, manifest abuse of discretion or arbitrary and capricious action amounting to bad faith or fraud and seriously prejudicial" Skinner v. US, Ct. Cl. (1979), 594 F. 2d 824.

112. In Mullvaney v. Stetson, 493 F. Supp. 1218 (1980), thirty-five years after his discharge and within the six years of Correction Board's consideration, the Court decreed that the instant action did not accrue until the date of the Correction Board's decision. In this case at bar before the United States Supreme Court, I remind this court that the Army Board for the Correction of Military Records (ABCMR) denied my last application/petition on 15 June 1993. (See 1993 letter to Congressman J. Moakley, in which the acting Assistant Secretary of the Army expresses his "personal" opinion "based on Church documents.") (Exh. 4 of Comp.) (See par. 26, p. 19 of App. BR.) (Also Motions, pp. 91, 92.)

113. In Ashe v. McNamara, 55 F2d 277 (1965) Ct. App. 1st Cir. it was held; ". . . an inferior court must be guided by a recent holding of the Supreme Court that a federal court may review and correct administrative action under section 1552 or Title 10, where it is alleged and proved that the discharge which the Department refused to change was itself illegal," Harmon v. Brucker, 1958, 355 US 379, 76 S.Ct. 433, 2 L.Ed. 2d 503 - as he was discharged in 1948.

114. "Unquestionably, the concealment of material facts that one is, under the circumstances, bound to disclose may constitute actionable fraud. Indeed, one of the fundamental tenets of Anglo-American law of fraud is that fraud may be committed by the suppression of truth (suppresio veri) as well as the suggestion of falsehood (suggestio falsi). It is therefore equally competent for a count to relieve against fraud, whether it is committed by a suppression of the truth that is by concealment or by a suggestion of falsehood," American Jurisprudence, 2Ed., Vol. 37, 3144, pp. 196, 197 - Resort to F.O.I.A. by plaintiff has been fruitless.

115. "Period of limitations does not begin to run until the alleged facts or omissions are discovered or in the exercise of reasonable diligence should have been discovered by the plaintiff," Hulver v. US DC Mo. 1975, 383 F. Supp. 749.

116. John T. Noonan, Jr., Judge on the IX Circuit Court of Appeals and author of "The Lustre of Our Country, the American Experience of Religious Freedom," Univ. Cal. Press, 1998, sums up some of his comments on conscience regarding the split between Church and State.

"By the first century A.D. there is in the Mediterranean world a religion, which will spread widely in the West, that carries the concepts of a God, living, distinct from and superior to any human being, society, or state; of obligations to that God, distinct from and superior to any society or state; of authorized teachers who can voice these obligations and judge any society or state; of an inner voice of reason that is one way God speaks as well as by His authorized teachers. According to these concepts as taught by this religion, each person, individually and not as part of a family, tribe, or nation, will have to account to God as Judge for every thought and deed. Collectively, these concepts are at the core of liberty of conscience and liberty of religion."

It is astonishing to this plaintiff that the Court of Appeals for the Federal Circuit to state on 20 August 1998 that; "in this case it is clear that there is no substantial question regarding the outcome of the appeal" and "that the position of one party is so clearly correct "as to warrant summary disposition" and also agreeing "that the Court of Federal Claims did not have jurisdiction." I hope that I have indicated otherwise in the above presentation that this is not a correct decision, in justice and equity by the Lower Courts.

Prayer: My claim is that I be made "whole" with all that means, including damages, and the restoration of my Regular Army Commission which has been fraudulently extorted and embezzled from this plaintiff. I hereby request an oral hearing.

Respectfully submitted,

Edward D. Cowhig, Pro Se

Edward D. Cowhig, Pro Se
245 C. J. Cushing Hwy.
Greenbush, MA 02040-0154
Tel. (781) 545-4330

COMMONWEALTH OF MASSACHUSETTS
ESSEX COUNTY

On this 27th day of January 1999, before me, RICHARD LLOYD NOTARY PUBLIC the undersigned, personally appeared, Edward D. Cowhig, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 27th day of January 1999.

Notary Public

My Commission Expires: My Commission Expires March 29, 200[illegible]

Service Made by Mail 29 January 1999 to:

U.S. Solicitor General
Department of Justice
10th Street and Constitution Ave., NW
Washington, DC 20530

Secretary of the Army
The Pentagon
Washington, DC 20310

BEST AVA

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LABLE COPY

APPENDIX A

Court of Claims Order – 19 March 1998

In the United States Court of Federal Claims

No. 98-180C

(Filed March 19, 1998)

****

EDWARD D. COWHIG, *

Plaintiff, pro se, *

v. *

THE UNITED STATES, *

Defendant. *

****

MAR 19 1998

Order

Plaintiff, who is proceeding pro se, has filed a complaint asserting a violation of the Contracts Dispute Act of 1978 (CDA), 41 U.S.C. § 601 et seq (1994), and seeking "an analysis of the contractual relationship between the Department of Defense and the [Archdiocese for Military Services], with a claim for settlement of damages for the violation of that contractual relationship whether express or implied to this plaintiff as a sub-contractor." Complaint at 13. Plaintiff was a Catholic chaplain in the Army until his voluntary resignation in 1962.

This complaint is one of a series filed by plaintiff in various courts since 1971. See, e.g., **Cowhig v. Chief of Chaplains, U.S. Army**, No. 91-2027, 1992 WL 58373 (1st Cir. 1992), at *3 (affirming district court's dismissal of plaintiff's civil suit for improper discharge on res judicata grounds), cert. denied, 460 U.S. 1092 (1983); **Cowhig v. United States**, No. 427-80C, 1981 WL 139578 (Ct. Cl. 1981) (dismissing plaintiff's 1980 claim to have his discharge, following his voluntary resignation from the Army in 1962, more than six years later, declared null and void on statute of limitations grounds, because an active duty pay claim accrues upon discharge).

The court agrees with the First Circuit that plaintiff is attempting to "pour old wind into new bottles" in order to bypass principles of res judicata, collateral estoppel, and statues of limitations. **Cowhig v. Chief of Chaplains, U.S. Army**, 1992 WL 58373 at *2. Essentially, plaintiff is still seeking redress for a claim that accrued in 1962 and that repeatedly has been dismissed as barred by the statute of limitations. Claims against the United Stats not brought within six years after the right of action first accrues are barred. 28 U.S.C. § 240(a). Accordingly, plaintiff's contract claim is dismissed as barred by the statute of limitations, as well as by claim preclusion, see **Faust v. United States**, 202 F.3d 675, 677 (Fed. Cir. 1996) ("[u]nder the doctrine of claim preclusion, a judgement on the merits precludes the same parties from relitigating issues in a subsequent action that were or could have been raised in the prior action").

Plaintiff's claim for reputational damages as a result of "libel and slanderous statements," for spiritual, emotional and psychological harms; and for fraud, even if timely, fall outside this court's jurisdiction, because this court is precluded from deciding cases sounding in tort. See **Brown v. United States**, 105 F.3d 621, 623-24 (Fed. Cir. 1997); 28 U.S.C. 1491(a)(1). Tort actions against the United States Court of Federal Claims Rule 12(h)(3) ("Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); 28 U.S.C. § 1915(e)(2)(B)(ii).

DIANE GILBERT WEINSTEIN
Judge, U.S. Court of Federal Claims

APPENDIX B

US Court of Claims Order – 15 March 1998

In the United States Court of Federal Claims

No. 98-180C

(Filed April 15, 1998)

****

EDWARD D. COWHIG, *

Plaintiff, pro se, *

v. *

THE UNITED STATES, *

Defendant. *

****

Order

Plaintiff, Edward D. Cowhig, pursuant to Rules 59(c)(1) and 60 of the United States Court of Federal Claims (RCFC), seeks rehearing of and/or relief from, the court's order of March 19, 1998 (Order) dismissing his claim for lack of subject matter jurisdiction. The court deems this to be a motion pursuant to RCFC 59(a). Such motions are directed to the court's discretion. See **Yuba Natural Resources, Inc., v. United States**, 904 F.2d 1577, 1583 (Fed. Cir. 1990).

Mr. Cowhig contents that the Order's statement that he left the service voluntarily is false. However, this appears from the statement by the Court of Claims, in dismissing his claim in 1981, that he had voluntarily resigned. **Cowhig v. United States**, No. 427-80C, 1981 WL 139578 (Ct. Cl. 1981) at *1. See also **Cowhig v. Marsh**, 693 F.2d 234 (1st Cir. 1982): "he tendered his resignation which was accepted on January 28, 1962."

Plaintiff's allegation that his departure was instead a "reluctant resignation . . . not freely given" and "forced, demanded by church

authorities. . ." is supported by a copy of a notice dated October 15, 1974 that purports to be the Under Secretary of the Army's direction, based on the ABCMR recommendation, to correct Mr. Cowhig's record to show that he was involuntarily released. However, the cited Court of Claims and First Circuit decisions, both dated well after October 15, 1974, do not mention this notice, nor is it clear that it was in evidence at the time of those decisions. Plaintiff does not indicate how he obtained this notice, the circumstances of its issuance, nor whether it was previously presented in evidence.

Nevertheless, these matters need not detain us, because how plaintiff left the service is irrelevant to whether his claim is barred, since the statute of limitations begins to run upon discharge, whether it was effected involuntarily or not.

The court takes this opportunity once more to advise Mr. Cowhig, as did the First Circuit in 1992, **Cowhig v. Chief of Chaplains, U.S. Army**, No. 91-2027, 1992 WL 58373 (1st Cir. 1992) that no good purpose is served by his re-casting the same complaints in new forms ("old wine into new bottles:) and that he should spare himself and the courts the considerable effort expended on such claims.

The motion for reconsideration of, and relief from, the court's order of March 19, 1998 is denied because no manifest error of law or mistake of fact material to the court's prior decision has been presented. **See, e.g., Principal Mutual Life Ins. Co. v. United States**, 29 Fed. Cl. 157, 164 (1993).

DIANE GILBERT WEINSTEIN
Judge, U.S. Court of Federal Claims

APPENDIX C

US Court of Claims Order – 19 May 1998

In the United States Court of Federal Claims

No. 98-180C

(Filed May 19, 1998)

****

EDWARD D. COWHIG, *

Plaintiff, pro se, *

v. *

THE UNITED STATES, *

Defendant. *

****

Order

Plaintiff Edward D. Cowhig seeks rehearing of and/or relief "in response to" the court's order of April 15, 1998, pursuant to Rules 59 and 60, respectively, of the United States Court of Federal Claims (RCFC), which order denied his motion for reconsideration. Plaintiff's current motion is thus, effectively, a second motion for reconsideration of the court's March 19, 1998 order dismissing his claim for lack of subject matter jurisdiction.

Plaintiff's request for reconsideration under RCFC 59(a)(1) is untimely since it was not filed within 10 days after the entry of the judgment. RCFC 59(b). Therefore, this motion is denied.

Plaintiff also requests relief under RCFC 60(b)(3) and (6). RCFC 60(b)(3) permits the court to relieve a party from a final judgment, order or proceeding for reasons of "fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party." RCFC 60(b)(6) permits the same for "any other reason justifying relief from the operation of the judgment."

As stated in the court's March 19 and April 15 orders, the court concludes (1) that plaintiff's claim is barred by the statute of limitations, which deprives this court of subject matter jurisdiction, see RCFC 12(h)(3), and (2) that the claim is barred by claim preclusion. See **Cowhig v. United States**, No. 98-180C (March 19, 1998) (order dismissing plaintiff's complaint); **Cowhig v. United States**, No. 98-180C (April 15, 1998) (order denying plaintiff's motion for reconsideration).

Accordingly, plaintiff's (second) motion for reconsideration is denied.* The clerk of the court is directed **not to accept any additional** filings related to the March 19, 1998 or April 15, 1998 order.

DIANE GILBERT WEINSTEIN
Judge, U.S. Court of Federal Claims

---

*A notice of appeal and "permission to file late" was filed on May 15, 1998.

APPENDIX D

US Court of Appeals for the Federal Circuit
Order of 20 August 1998

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

98-5116

EDWARD D. COWHIG

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ON MOTION

Before PLAGER, Circuit Judge, Friedman, Senior Circuit Judge, and BRYSON, Circuit Judge.

ORDER

The United States moves for summary affirmance of the United States Court of Federal Claims' March 19, 1998 order dismissing Edward D. Cowhig's complaint for lack of subject matter jurisdiction. Cowhig has not responded.

Cowhig filed suit against the United States, alleging a violation of the contracts Dispute Act of 1978 in connection with his 1962 resignation from the Army as a chaplain. Noting that Cowhig's complaint was "one of a series filed by [Cowhig] in various courts since 1981," the Court of Federal Claims noted that Cowhig was "attempting to 'pour old wine into new bottles' in order to bypass principles of res judicata, collateral estoppel, and statutes of limitations." In addition, the trial court determined that to the extent Cowhig alleged a claim sounding in tort, jurisdiction over such claims was exclusively granted to district courts. On these grounds, the trial court concluded that it lacked subject matter jurisdiction to entertain Cowhig's complaint. The Court of Federal Claims thus dismissed the complaint. Subsequently, the trial court denied

Cowhig's motions for rehearing or relief from the March 19 order. This appeal followed, and the United States moved for summary affirmance.

Summary disposition of a case "is appropriate, inter alia, when the position of one part is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994) (summarily affirming Court of Federal Claims' dismissal of a complaint). In this case, it is clear that there is no substantial question regarding the outcome of the appeal. We agree with the Court of Federal Claims that it did not have jurisdiction over Cowhig's complaint. Summary affirmance, therefore, is appropriate.

Accordingly,

IT IS ORDERED THAT:

(1) The United States' unopposed motion for summary affirmance is granted.

(2) Each side shall bear its own costs.

FOR THE COURT

August 20, 1998
Date

S. Jay Plager
Circuit Judge

cc: Edward D. Cowhig
John J. Hoffman, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

AUG 20 1998

JAN HORBALY
CLERK

s11

ISSUED AS A MANDATE: OCT 15 1998

APPENDIX D1

Denial of Reconsideration
18 September 1998

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

98-5116

EDWARD D. COWHIG

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ON MOTION

Before PLAGER, Circuit Judge, Friedman, Senior Circuit Judge, and BRYSON, Circuit Judge.

ORDER

Edward D. Cowhig submits a combined "motion for reconsideration/rehearing" and suggestion for hearing in banc of the court's August 20, 1998 order granting the United States' motion for summary affirmance of the Court of Federal Claims' order dismissing Cowhig's complaint.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The motion for reconsideration is denied.

(2) The suggestion for rehearing in banc shall be transmitted to the circuit judges who are in regular active service.

FOR THE COURT

SEP 18 1998

Date

S. Jay Plager
Circuit Judge

cc: Edward D. Cowhig
John J. Hoffman, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

SEP 18 1998

JAN HORBALY
CLERK

s11

APPENDIX E

Order of US Court of Appeals for Federal Circuit
2 October 1998

And Letter of Clerk Rejecting my Motions in
Regard to that Order

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on October 13, 1998 unless another time becomes appropriate under Rule 41.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: October 1, 1998

cc: EDWARD D. COWHIG
JOHN J. HOFFMAN

FILED
US COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
OCT 2 1998
JAN HORBALY
CLERK

COWHIG V US, 98-5116
(CFC - 98-CV-180)

****

* Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record. *

****

APPENDIX E1

Motion to Review, Revoke, and Stay Order of
20 October 1998
Considered "Repetitive"

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON D.C. 20439

JAN HORBALY
CLERK

TELEPHONE: 633-6550
AREA CODE 202

OCT 14 1998

Edward D. Cowhig
245 C.J. Cushing Highway
Greenbush, MA 02040-0154

Re: Cowhig v. US, 98-5116

Dear Mr. Cowhig:

This is in response to your recent submission, styled as a "Motion to Review, Revoke, and Stay."

On September 18, 1998, the court denied your motion for reconsideration of the court's August 20 order, which granted the United States' motion for summary affirmance. On October 2, 1998, the court denied your combined petition for rehearing and suggestion for rehearing in banc concerning the August 20, order. In your most recent submission, you again seek reconsideration in connection with the court's August 20 order. The court does not consider repetitive motions for reconsideration.

Very truly yours,

Jan Horbaly

JH/js

cc: John J. Hoffman, Esq.

APPENDIX F

Memorandum Regarding Involuntary Release
15 October 1974

DEPARTMENT OF THE ARMY
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D.C.

15 OCT 1974

AG 201 - COWHIG, EDWARD D.
016-14-7279

MEMORANDUM FOR THE ADJUTANT GENERAL:

Having approved the findings, conclusions and recommendation of the Army Board for Correction of Military Records, and under the provisions of 10 U.S.C. 1552, it is directed:

That all Department of the Army records of EDWARD D. COWHIG be corrected to show that he was involuntarily released from active duty under the provisions of Title 10 U.S.C. 3785, on 23 January 1962.

Herman R. Staudt
Under Secretary of the Army

APPENDIX G

Extension of Time by Supreme Court of US
on 17 December 1998
to 30 January 1999

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

December 17, 1998

Mr. Edward D. Cowhig
245 Chief Justice Cushing Hwy.
Greenbush, MA 02040

Re: Edward D. Cowhig
v. United States
Application No. A-489

Dear Mr. Cowhig:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on December 17, 1998, extended the time to and including January 30, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

Melissa A. Blalock
Assistant Clerk

APPENDIX H

Affidavit of Plaintiff's Commanding Officer
30 March 1985

(His testimony before 1983 ABCMR Hearing
Can Be Available)

AFFIDAVIT OF

COLONEL ROBERT E. McMAHON, U.S. A. (Rtd), 082-32-1341, commander of the 2nd ABN/503rd Infantry from May 196-0 to July 1962, submit the following comments concerning the Minority Report (Dissent) of the Army Board for the Correction of Military Records, dated 21 and 26 September 1983, in the case of Father Edward D. Cowhig, 016-14-7279:

Reference par. (c) of the Minority Report:

I know of no occasion where "the applicant's abuse of alcohol was affecting his performance of duty and tarnished his image as an officer and Army Chaplain." On the contrary, he carried out all his duties in an exemplary manner. His character was impeccable; his conduct was flawless; he was admired and respected by all who knew him.

Further, I know of no time wherein Father Cowhig "failed to go to work for four days because of being incapacitated due to abuse of alcohol." As far as I know, Father Cowhig never avoided, shirked, religious duty. On the contrary, he was always on duty with his troopers, constantly working with them; planning, creating, and implementing ways to make them better soldiers.

Additionally, "that his drinking problem was a matter of record in an Officer Efficiency report," The Minority Report was

incorrectly based on part on the Officer Efficiency Report (OER) for the period 13 July 1961 to 1 October 1961 that I endorsed on Father Cowhig wherein I misjudged his illness. This OER was misleading, and did not present the facts accurately. I am certain that the Majority of the Army Board for the Correction of Military Records felt that the OER should have been voided and expunged from Father Cowhig's record for they recommended that he be restored to duty and promoted to the grade of Major. I felt that the time of notification and dispatching the OER was unusually short. I failed to give the OER the in-depth analysis required of such an important document affecting the career of Father Cowhig. I prepared the OER primarily from the medical reports of 27 July 1960 and 24 February 1961, and in addition, from the recommendations of Lt. Col. Hannum, Chief of the Neuropsychiatric Service at Camp Hue Hospital (Okinawa). Any reference of inference that I made to Father Cowhig concerning alcoholism was incorrectly derived from these two medical reports, discussions with Lt. Col. Hannum, and Father Emmett Walsh, Senior Catholic Chaplain, Headquarters, U.S. Army Ryuku Islands/IX Corps (Okinawa). I erroneously came to the conclusion that Father Cowhig attend a group therapy meeting at the hospital on Okinawa, which I was led to believe was going to be a session conducted by an experienced medical person. Instead, the moderator was a private or corporal from the hospital.

In my opinion, Lt. Col. Hannum incorrectly diagnosed Father Cowhig's medical problem. His emphasis was on alcoholism, and not the real problem, namely, that Father Cowhig was suffering from severe case of anxiety and hypertension that required immediate expert medical treatment. If Lt. Col. Hannum had emphasized the fact that Father Cowhig's primary problem was severe hypertension, and not alcoholism, my OER would have brought that fact out, and placed it in proper perspective. With this knowledge, I would have endorsed PART VI (Over all Demonstrated Performance) under (b) of the OER as EXCEPTIONAL with a value of 90, instead of (3) EFFECTIVE with a value of 40.

Reference par. (D) of the Minority Report:

As I mentioned above, Father Cowhig's primary medical problem was severe hypertension encompassing high blood pressure and great emotional tension. His many hospitalizations should have properly identified this number one cause of his medical problem; especially, Lt. Col. Hannum when he first saw Father Cowhig in February 1961. He should have insisted that Father Cowhig be immediately be evacuated to CONUS for expert medical treatment. The medical profession was negligent in permitting Father Cowhig's condition to worsen, and to drag on for another year; worse of all, allowing Father Cowhig to be labelled an alcoholic. Father Cowhig knew that his real problem was

extreme anxiety and hypertension, that he needed expert medical help, and that group therapy could not help him. Consequently, their outward impression that he half-heartedly attended group therapy session on Okinawa.

Reference par. (e) of the Minority report:

This paragraph gives the wrong impression about Father Cowhig received proper medical treatment and psychiatric evaluation while on active duty, that he was seen and examined by two qualified psychiatrists who properly diagnosed his alcohol related problems.

The two psychiatrists were undoubtedly, Lt. Col. Hannum (February 1961 in Okinawa), and Captain Franklin (October-November 1961 at Walter Reed Hospital). Judging from my contact with Lt. Col. Hannum, I would say that he made a very cursory and meaningless evaluation of Father Cowhig's condition. According to Father Cowhig, his meeting with Lt. Col. Hannum in February 1961 was neither an examination, or treatment or evaluation. The meeting took approximately 15 minutes; certainly not sufficient time for a thorough diagnosis of Father Cowhig's medical problem.

I noticed in the record of the Army Board for the Correction of Military Records that Captain Franklin was not an expert in psychiatry having recently or just completed his training program in psychiatry at Kaiser Found., San Francisco, Calif. in

June 1961, and began his residency at Walter Reed General Hospital, Washington, D.C. in September 19651. (Exhibit #2 at 1983 HEARING); further, that he was not a Board-Certified psychiatrist. As a result, Captain Franklin lacked the proper experience necessary to treat Father Cowhig in October 1961 when Father Cowhig was his patient. Hence, there is one psychiatrist attending Father Cowhig, Lt. Col. Hannum who did not conduct a proper medical evaluation in February 1961, and the other, Captain Franklin, had just begun his residency at Walter Reed Hospital in September 1961.

I also direct your attention to the fact that Father Cowhig was told to resign on 31 October 1961, and the diagnosis of his medical case prepared by Captain Franklin was made on 6 November 1961, merely restating the diagnosis made in Okinawa. For all practical purposes, Father Cowhig's career in the Army terminated on 31 October 1951 without the Army even considering Captain Franklin's report, the second so-called qualified psychiatrist.

It is important to note that the 2nd Airborne Battle Group/503rd Infantry was an elite parachute combat team strategically located on Okinawa for possible military operations in South East Asia; one such mission was assigned to the unit in January 1961, and was later canceled. Father Cowhig as a select member of this organization had access to security information on

a "need-to-know" basis. No one, outside of a few select individuals, knew the gravity of the situation that confronted the 2nd Airborne Battle Group/503rd Infantry at that time.

As a result, father Cowhig convinced that his troopers would soon be committed to combat, with the strong possibility that many soldiers might be lost, feverishly stove to have them make their peace with God, beforehand. To him, his tasks seemed insurmountable, and most difficult, for time was short. His men did not know of a probable real combat mission. Frustrated and under severe mental pressure, Father Cowhig worked incessantly to get his job done. Finally, after three or four sleepless nights through sheer mental and physical exhaustion, he voluntarily checked into the hospital on Okinawa on 2 February 1961, suffering from complete exhaustion and severe anxiety.

Thus we see that Father Cowhig with security restrictions handing over his head could not make the medical or his ecclesiastical superiors aware of the difficulties of accomplishing his mission; nor could they fully understand the mental anguish that Father Cowhig was suffering.

To an observant psychiatrist, the warning signs concerning Father Cowhig's condition were there indicating medical treatment. However, they were ignored. Instead, alcoholism was listed as the cause of Father Cowhig's problem.

When Father Cowhig left Okinawa for CONUS in October 1961, I thought that he was returning for medical treatment. I thought that he would return to the Battle Group. I had no idea that he was being forced to resign from the U.S. Army. If I would have known that, I would have fought vigorously to retain him on active duty.

In short, the whole scenario of Father Cowhig's tragic career from February 1961 to his involuntary resignation is racked with errors, misunderstandings, innuendoes, and prejudice.

I am positive that if Father Cowhig had received immediate medical treatment after his first hospitalization in July 1960, or the latest in February 1961, that he would have fully recovered and been returned to active duty.

I strongly recommend that the injustice that has been done against Father Cowhig while in the U.S. Army be rectified as advocated by the Majority Report of the Army Board for the Correction of Military Records.

s/Robert E. McMahon
Colonel, U.S.A. Rtd.
1760 Avenida del Mundo
Coronado, CA 92118
Dated 30 March 1985

APPENDIX J

Statement from Plaintiff's Executive Officer
10 July 1985

(His testimony before 1983 ABCMR Hearing
Can Be Available)

10 July 1985

STATEMENT

I, Chester B. McCoid, 566-54-2624, Colonel (Retired), U.S. Army, submit the following observations. These concern the 29 March 1984 memorandum of the Principal Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs) (PDASA). The document addresses the appeal of Father Edward D. Cowhig, 016-14-7297, to the Army Board for the Correction of Military Records (ABCMR). The hearings bearing on the matter were held at the Pentagon Building on 21 and 26 September 1983.

The thrust of the PDASA's memorandum is a denial of the Cowhig appeal, based on an embracing of the ABCMR Minority Opinion. At the risk of appearing cavalier, and of being too emotionally involved in the matter, I must respectfully disagree with the PDASA's action.

Attention is again invited to the fact that the damning Efficiency Report, prepared by me on such short notice on the occasion of Chaplain Cowhig's evacuation of Okinawa, was inaccurate. This basic document, which was used to justify much of the action taken against Cowhig at the time, still impacts on the case. I feel that it should be stricken from the official record.

In my oral testimony on 21 September 1983, I failed to stress how fully the Chaplain participated in operational planning and how comprehensive was his knowledge of impending classified operations in Southeast Asia. In large measure the hostility of the USARYIS Chaplain to Father Cowhig was a result of the latter being unable to inform the former as to exactly why USARYIS-assigned duties could not be undertaken. USARYIS was an administrative headquarters at the time, and Chaplain Emmett Walsh had no "Need to Know." Clearly Cowhig could not keep the Assistant USARYIS Chaplain brief on the 503d's activities, in light of existing security restrictions, and this Walsh could not and would not accept. Indeed, he suggested that Cowhig was uncooperative and avoiding tasks properly assigned. In any case, this was a key element in the USARYIS view of the Cowhig matter.

Now to the Minority Findings, ABCMR. Although honestly drawn, there are three points contained in the report which do not square with the situation existing on Okinawa in 1961. These are:

1. At no time was our Catholic Chaplain absent without authority from Headquarters, 2d Airborne Battle Group, 503d Infantry Combat Team. He met every requirement fully, both as to time and place. There were occasions when he could have remained on leave or pass and allowed his functions to have gone

undone. Yet, he always managed to see that our troopers were properly cared for, and this at the cost of great personal effort in some instances. To suggest that our chaplain was AWOL for a period of four (4) days simply is not true.

2. Although Cowhig drank, as did we all, he always performed his duties in brilliantly successful fashion. Had the Chaplain been guilty of the acts of omission and dereliction leveled by his accusers, morale in the 503d would have suffered. I assert here, without equivocation of any sort, that the morals and morale of our troops were never higher than when Cowhig was our senior Chaplain. I further state that in my opinion, Cowhig was not an alcoholic. This judgment is buttressed by the fact that I had been instrumental only months before in boarding our S5 (Civil Affairss) for just that failing. Additionally, in nearly thirty-five years of service, I had seen many alcoholics and know that Cowhig, with whom I had almost daily contact, simply did not fit the pattern.

3. Much has been made of the Cowhig failure to attend or to participate fully in Alcoholics Anonymous activity in Okinawa. Here was an alleged requirement of which I was not then aware -- and one with which I would never have agreed, knowing the man. Even conceding that AA might have been useful, and I make so such concession, this was supremely cruel prescription. The net effect would have been to compromise the position of a marvelously useful moral leader and counselor of men

in trouble. One must wonder whether anyone in such a situation, alcoholic or not, could have participated in any such program and still gotten his job done. I suggest that once any Chaplain's AA involvement became widely known -- and this would be a certainty -- his usefulness would be ended. It is easy to dismiss this contention, of course. Yet one must place oneself in Cowhig's position at the time. He would surely know that AA attendance, even if indicated by "qualified medical doctors and psychiatrists," would ruin him as a Chaplain. Now, add his feeling that his problem was associated with overwork and hypertension, and one can see that he was faced with an impossible situation. The question is moot. Cowhig never was ordered to attend AA and in fact, never did attend these meetings and at that time in no way could be termed an "AA Failure," as the 'Minority Asserts.'

Now a final comment. Despite the PDASA's busy schedule, it is disquieting to contemplate a mere 24-hour interval between receipt of the ABCMR report and associated recommendations, adoption of the minority position, and publication of his memorandum to that effect. While the Cowhig appeal may be small potatoes in Washington, the man's damaged reputation and the cause of equity and justice would appear to have deserved a less hurried ending.

s/Chester B. McCoid

Colonel, U.S. Army (rtd.)

67 Bell Street

Middletown, Conn. 06457

APPENDIX K

Statement of Doctor George W. Roark
18 October 1991

(His testimony before 1983 ABCMR Hearing
Can Be Available)

George W. Roark, M.D.
205 Locust Court
Issue, MD 20645

October 18, 1991

Fr. Edward D. Cowhig
St. Alphonsus Rectory
488 Elliott Street
Beverly, MA 01915

Dear Father Cowhig:

At your request I am forwarding my opinions concerning the March 1984 reversal of the Assistant Secretary of the Army of the recommendations of a majority of members (3 to 2) of the Army Board for Correction of Military Records (ABCMR) reached in the Board's September 23-26, 1983 Hearing of your petition. I have based this response on my review of a transcript of my testimony before the Board on September 23, 1983; and on the following letters you provided for my examination including:

(1) From - Laurence J. Clark, M.D. to the ABCMR, dated October 24, 1985;

(2) From - Edmund N. Kudarauskas, M.D. to (address unknown), dated November 22, 1985;

(3) From - William A. Rohde, M.D. to ABCMR, originally dated May, 1985; corrected to January 23, 1986;

(4) From - Richard M. Kilfoyle, M.D. to Fr. Cowhig, dated February 6, 1986; and

(5) From - John J. Dowling, M.D. to Fr. Cowhig, dated July 28, 1986.

In addition I re-reviewed my file on you which I had earlier reviewed without the benefit of a transcript of my testimony before the ABCMR, as reflected in my letter to you of March 4, 1985.

As you will recall in my testimony before the ABCMR I drew upon my 5-hour psychiatric examination of you on September 7, 8 and 23, 1983, plus the report from Wolfgang Riedel, Ph.D., of his 3 hours of psychological testing on September 9, 1983. The opinion expressed in the Dissent that my examination was invalidated by the twenty plus years that had passed since your illness on Okinawa (1961-62) does not take into account the intensity, thoroughness and sophistication of your 8 hour examination by Dr. Riedel and myself. The Dissent also shows naivete in assuming that the "facts" I adduced from my examination were based solely on your verbalized memory of events in your life twenty years earlier. Another implication in the Dissent was that my clinical judgment was impaired or unprofessionally influenced by my retention by your attorney for the sole purpose of facilitating his presentation of your case. In interpret this implication as

suggesting that my conclusions were less than objective, if not myopic in effect; and that my motive in accepting your case was less than professional, both of which implications I reject outright. The opinion of the Board (which consisted entirely of non-medical members) should have been reached on the basis of weighing all the facts, as presented, not (as in the Dissent) evaluating the conclusions of the examining psychiatrist and psychologist.

In reviewing the transcript of my testimony, I attempted to respond to questions you asked me to address in paragraphs 1, 2 and 3 of your letter to me dated May 16, 1985. (Please accept my apology for my long delay in responding. I misplaced the first copy of the transcript you had mailed to me in March 1985.)

(1) Para 1 (of yours of May 16, 1985): The essence or central point of my examination findings and conclusion was that your illness on Okinawa in 1961 was due to a psychoneurosis, (generalized anxiety disorder) which you were attempting to self-treat through increasing your use of alcohol for its tension-reducing and sedative effects. I believe that had your condition been accurately diagnosed, and had appropriate treatment been provided by competent military medical personnel in 1961 or 1962, that your symptoms could have been mitigated or resolved and you then could have return to duty.

(2) Para 2: I could find no reference on p. 160ff. in the transcript of the question of the diagnosis of your condition.

However, on pp. 175, 1988-190 I did draw a clear distinction (based on the current nomenclature of mental disorders of the American Psychiatric Association, D.S.M.-III-R) between alcohol dependence (or addition) and episodic alcohol abuse/misuse secondary to stress or underlying illness. In my opinion you suffered from alcohol abuse in 1961-62, not dependence. (Regretfully, in 1961-62 the nomenclature did not make this distinction clear and the diagnosis of chronic alcoholism was applied both to conditions of alcohol dependence and to various types of alcohol abuse, overuse or misuse.) I testified that in my opinion your abuse of alcohol was a form of self-medication secondary to the stress of your duties and to the recurrent acute feelings of anxiety about the prospect of failure in your assignment

(3) Para 3: (You have asked me to address a number of issues in this paragraph, some of which I believe I covered in the foregoing.) As to Dr. Franklin's inexperience and questionable competence, the absence in the narrative summary of your Walter Reed General Hospital (WRGH) hospitalization of any reference to the psychologically traumatic loss of your mother, or to the childhood experiences sensitizing you to the possibilities of mutilating injury or death would suggest the same. Presumably, he was supervised in his work so that the failure to secure senior psychiatric consultation and psychological testing may not be laid entirely on him.

The absence of any medical or psychiatric treatment at WRGH is not surprising, given the guarded prognosis for rehabilitation and recommendation for "administrative disposition" of your case by Dr. Franklin. Once again, I believe that the outcome of your hospitalization at WRGH represented an error in the diagnosis and medical management of your case. Had you been diagnosed as having an anxiety disorder and treated appropriately for it, I believe there would have been a favorable prognosis for remission of your symptoms, allowing you to return to your military duties.

I believe the notation in the transcript "no audible response" to a question by Mr. Kabatchnick concerning whether I thought your condition was in the line of duty (LOD) or whether it had existed prior to service (EPTS) reflected my uncertainty as to whether or not I had fully understood his question. I did clarify my opinion on those questions on the bottom of p. 204, "I think . . . he was clearly in the performance of his military duties (LOD) and . . . I doubt that it (the condition of abuse of alcohol, manifested by excessive alcoholic intake under stressful situations) existed prior to service."

Finally, you asked me to clarify my response to a Board member (Mr. Hobbs) asking me to comment on whether your seeking justice and fair treatment from the Army via your petition to the ABCMR amounted to "a crusade". I found may reply on

page numbered "215B": "I don't know whether he thinks of himself as a crusader. I think he may well function in that capacity, in terms of how diligent he's been in preserving in bringing his case to the attention of authorities".

I trust my answers to your specific questions about my testimony and my reiteration of my original findings and opinions about your 1961-62 illness have been responsive to your inquiries and will serve your best interests in the future. As I've mentioned to you in a recent phone conversation, I am now retired from practice and have only very limited time to devote to letter summaries such as this. I hope your life goes well and that your efforts to find relief from the unfortunate reversal of the ABCMR's decision by the Army are successful.

Cordially,

George W. Roark

THE CONSTITUTION

Some Laws of this Appendix to Petition For Certiorari
(as Marked thereon)

The Constitution (Amend. Art 1)	p. 96
International Covenant on Civil and Political Rights	p. 96
4th, 5th, 14th Amendment	p. 97, 98
28 USC 1346	
10 USC 3784	p. 101
10 USC 3785	p. 101, 102
32 CFR 581.3(d)(5)(1)	p. 104
5 USC 706	p. 104, 105
32 CFR 65.4(b)	p. 105, 106
32 CFR 510.1	p. 107
Rule 1002 FRCP	p. 111
Rule 1003 FRCP	p. 111
Rule 1004 FRCP	p. 111
Army Regulation (AR 15-815)	p. 111
Rule 44(b)(Lack of Record)	p. 154
18 USC 2071	p. 154
18 USC 1505	p. 155
18 USC 1506	p. 155
18 USC 1001	p. 156

10 U.S.C. 3784: Removal of officer: Action by Secretary of the Army upon recommendation.

The Secretary of the Army may remove an officer from the active list of the Regular Army for any cause that he considers sufficient, if removal for that cause is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive. Aug. 19, 1956, c. 1041, 70A Stat. 219.

10 U.S.C. 3785: Rights and procedures

(a) Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be--

(1) notified in writing of the pendency of any proceeding for his removal;

(2) allowed reasonable time to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry and a board of review; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding.

(b) No person may be a member of more than one board convened under this chapter for the same officer. Aug. 10, 1956, c. 10412, 70A

10 U.S.C. 1185: Rights and procedures

(a) Under regulations prescribed by the Secretary of Defense each officer required under section 1181 of this title to show cause for retention on active duty--

(1) shall be notified in writing, at least 30 days before the hearing of his case by a board of inquiry, of the reasons for which he is being required to show cause for retention on active duty;

(2) shall be allowed a reasonable time, as determined by the board of inquiry, to prepare his showing of cause for his retention on active duty;

(3) shall be allowed to appear in person and to be represented by counsel at proceedings before the board of inquiry; and

(4) shall be allowed full access to, and shall be furnished copies of, records relevant to his case, except that the board of inquiry shall withhold any record that the Secretary concerned determines should be withheld in the interest of national security.

(b) When a record is withheld under subsection (a)(4), the officer whose case is under consideration shall, to the extent that the interest of national security permits, be furnished a summary of the record so withheld.

32 C.F.R. 581.3(d)(5)(1)

Access to Records: (1) The applicant will be assured access to all official records that are necessary to an adequate presentation of his case consistent with regulations governing privileged or classified material. It is the responsibility of the applicant to procure such evidence not contained in the official records of the Department of the Army as he desires to present in support of his case.

Scope of the Review

Title 5. U.S.C. 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonable delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(a) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(d) without observance of procedure required by law;

(e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of and agency hearing provided by statute; or

(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the courts shall review the whole record or those parts of it cited by a part and due account shall be taken of the rule of prejudicial error.

32 C.F.R. 65.4(b)

(b) Criteria for Ecclesiastical Endorsing Agencies: (1) religious faith groups that seek to become ecclesiastical endorsing agencies for the purpose of certifying the professional qualifications of clergy for appointment as chaplains in the Military Services shall obtain DoD recognition through the action of the Armed Forces Chaplains Board (AFCB). To be considered for DoD recognition each religious faith group shall:

(i) Be organized exclusively or substantially to provide religious services to a lay constituency.

(ii) Be able to exercise ecclesiastical authority to grant or withdraw ecclesiastical endorsements.

(iii) Be able to provide continuing validations of ecclesiastical endorsements.

(iv) Be able to endorse clergy who are qualified to provide for the free exercise of religion by all members of the Military Services, their dependents, and other authorized persons.

(v) Abide by the applicable regulations and policies of the Department of Defense.

Part 510 - Chaplains

510.1 Private Ministrations, Sacraments, and Ordinances

Chaplains will conduct or arrange for appropriate burial services at the interment of members of the military service, active and retired, and for members of their families upon request. A chaplain may perform the marriage rite, provided he complies with the civil law of the place where the marriage is to be solemnized and provided all parties concerned have complied with the requirements of the denomination the chaplain represents and with any directives which may have been issued by the military command or higher headquarters. The scope of the chaplains' work will include such ministrations as are held by some denominations or religious bodies as sacraments and by others as rites or ordinances. Chaplains will administer or arrange for rites and sacraments for military personnel and civilians under military jurisdiction according to the respective beliefs and conscientious practices of all concerned.

111

RULE 1002: REQUIREMENT OF ORIGINAL

To prove the content of writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

RULE 1003: ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

RULE 1004: ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing recording, or photograph is admissible if --

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when ad original was under the control of the party whom offered, that party was put on notice by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral mater. The writing, recording, or photograph is not closely related to a controlling issue.

ARMY REGULATION 15-815, PAR 22

Reconsideration: After final adjudication, further consideration will be granted only upon presentation by the applicant of newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Army.

Rule 44(b)

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

18 U.S.C. 2071

Concealment, removal, or mutilation generally

(a)Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies,

or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

18 U.S.C. 1506

Theft or alteration of record or process; false bail

Whoever feloniously steals, takes away, alters, falsifies, or otherwise avoids any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect or;

18 U.S.C. 1505

Obstruction of proceedings before departments, agencies, and committees

Whoever, corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee or either House, or any joint committee of the Congress; or

18 U.S.C. 1001

Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Bill of Rights

Article I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridgning the freedom of speech, or of the press; or of the right of the people peaceably to assemble and to petition the government for a redress of grievances.

§23.3 Thought, conscience, and religion

§23.3.1 TEXTS

ICPR International Covenant on Civil and Political Rights (in Force 1976)

18 (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice [emphasis supplied]

Article Four

THE right of the people to be secure [emphasis supplied] in their persons, houses, papers [emphasis supplied], and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article Five

No person shall [emphasis supplied] be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; not shall be compelled in any criminal cases to be a witness against himself, nor deprived of live, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation [emphasis supplied].

Article Seven

"In suits of common law, where the value in controversy shall exceed twenty dollars, the right to a trial shall be preserved and no fact tried by a jury, shall be otherwise examined in any court of the United States, than according to the rules of the common law."

Article Fourteen

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

APPENDIX M

To Cardinal Law of Boston
3 March 1993

ARCHDIOCESE FOR THE MILITARY SERVICES, USA
(Ordinariatus Castrensis)
962 WAYNE AVENUE
SILVER SPRING, MARYLAND 20910
Telephone (301) 495-4100
FAX (301) 589-3774

Office of the Archbishop

March 3, 1995

His Eminence
Bernard Cardinal Law
Archbishop of Boston
2101 Commonwealth Avenue
Brighton, MA 02135

RECEIVED
MAR 7 1995
OFFICE OF THE SECRETARY

Your Eminence:

I am in receipt of your letter of 22 February 1995 concerning Father Edward Cowhig. Hopefully, this reply will be of some assistance to Your Eminence in your efforts to assist Father Cowhig.

Bishop John Glynn has spent the last few days culling through the voluminous files we hold concerning this matter. The enclosed copies of correspondence held in our files may be helpful to Your Eminence and to Father Cowhig.

It would appear, from a review of our files, that the action of the Military Ordinariate in October of 1961 concerning the situation of Father Cowhig was, as noted in the enclosed copy of my letter of 1984, based principally on the "Caraway Report." A discussion of this report is contained in the enclosed correspondence.

Copies of other pertinent letters and reports are also contained in the correspondence enclosed.

As a civilian office, we are not, and have never been, a custodian of military records.

Since 1990 the Archdiocese for the Military Services has been a co-defendant with the Army in suits initiated by Father Cowhig - in courts all the way to the Supreme Court. Our legal defense, as Your Eminence may surmise, has cost us many thousands of dollars.

I trust that the information noted in this letter will assist Your Eminence in your efforts to help Father Cowhig.

With assurances of my prayers for all members of the great Archdiocese of Boston, I am

Faithfully yours in Christ,

+Joseph T. Dimino
Archbishop for the Military Services

JTD/ms

APPENDIX N

Letter From ABCMR (1984)

P.S. I have not been afforded a proper opportunity to disclose classified information – original "Caraway Report" missing.

N-2

ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
WASHINGTON, DC 20310
19 JUN 1984

SFMR

Reverent Edward D. Cowhig
245 Chief Justice-Cushing Highway
Greenbush, Massachusetts 02040-0154

Dear Reverend Cowhig:

This is in further reference to your letter under the Freedom of Information Act, wherein you request a complete and entire copy of all records maintained y this Board in the consideration of your case. This is also in reply to your letter to the Honorable Edward M. Kennedy, who has requested that the Board respond directly to you, in regard to your inquiry to his office.

Pursuant to your request, please find enclosed a complete copy of the entire file maintained by the Army Board for Correction of Military Records concerning the considerations of your case.

As the Honorable Paul E. Tsongas was advised on 6 June 1984, contrary to your contention, the minority of the Board's members, who recommended that your application be denied, did not base their dissent largely on a copy of a letter, the authenticity of which you challenge. The Board's minority decision was based on substantial, undisputed evidence that you were a practicing alcoholic in 1961 and chose not to abstain from the abuse of alcohol resulting in your being hospitalized on several occasions for treatment. Your abuse of alcohol also resulted in your being relieved of your duties and returned from overseas for medical treatment at the Walter Reed Army Medical Center. The evidence before the Board further revealed that subsequent to discharge from the Army in 1961, you continued to abuse alcohol which resulted in several more hospitalizations and the loss of a church parish.

SFMR
Reverent Edward D. Cowhig 19 JUN 1984

After 20 years, the Board is unable to ascertain why the original letter/document from Lieutenant General Paul W. Caraway is not currently in military files. However, it would appear that the original letter/document is or was in the hands of your Military Ordinariate in New York. You have previously stated that you saw a copy of the letter in your military file during your stay at Walter Reed Army Medical Center in 1961. Because the letter was not critical in its determination, the Board made no attempt to determine its authenticity. However, the Board members were of the opinion that if General Caraway did not sign the letter, it was properly prepared and signed for him by his staff.

Concerning your contentions to Senator Kennedy that you have been denied the opportunity to disclose classified information which may help you case, you have been advised on numerous occasions that you had the right to present such information to the Board for consideration. In two formal hearings, in which you appeared in person, and with counsel, you presented no such evidence for the Board's consideration.

Sincerely,

John. W. Matthews
Executive Secretary

Enclosure

CF: Honorable Edward M. Kennedy

APPENDIX O

Quotes -- Assistant Secretary Army
29 March 1984

In my petition for Certiorari, Appendix J, p. 79a, the rationale for the denial of my action before the ABCMR, the Assistant Secretary of the Army states that "based on my review" of this second hearing, *it is my determination* that no error or injustice exists." On page 80a, Idem, the Assistant Secretary states: "Contrary to the majority's opinion, I find no conspiracy, on the part of the Army, in the applicant's resignation. *The applicant's resignation was tendered as a result of an* ***edict*** *of the Military Ordinate* (sic) of the Catholic Church, which stated *he either resign* from the Army or *lose* his ecclesiastical endorsement. *That* ***edict*** *was based solely on his excessive abuse* of alcohol, which was affecting his performance of duty as an Army chaplain and sullying his reputation as a chaplain and a priest." -- 29 March 1984.

The Assistant Secretary was in error on *all the points* in his rationale, and part I have quoted in itself makes *manifest* the *"cause"* of my separation, this is the so-called "edict," which Bishop Dimino, Vicar General, Military Ordinariate, stated in August 1984 was "*principally* because of a *copy* of a letter, *believed to be authentic*, sent from Lt. Gen. Paul W. Caraway *to the Chief of Chaplains* containing adverse comments concerning Father Cowhig." My Brief App. Ct. App. 88-1012, page 147. What a run around! And the government says that the disputed document is "properly" in the hands of the Church. GARBAGE!